

## IRAC ANALYSIS OF OPUZ VS TURKEY: JUSTICE, DOMESTIC VIOLENCE AND HUMAN RIGHTS

**Viral Shah\***

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| <b>CASE TITLE</b> | Opuz v Turkey  |
| <b>CITATION</b>   | Human Right Briefs 17, no 1 (2009) 29-33   |
| <b>COURT</b>      | EU Court of Human Rights   |
| <b>BENCH</b>      | President- Josep Casadevall, with<br>Judges- Elisabet, Corneliu, Alvina, Egbert, Ineta, Isil |
| <b>DECIDED</b>    | June 9, 2009   |
| <b>APPELLANT</b>  | Ms. Nahide Opuz  |
| <b>RESPONDENT</b> | The Republic of Turkey   |

### FACTS OF THE CASE :- A CYCLE OF VIOLENCE, A FAILURE TO ACT

1. The applicant's mother divorced A.O. in 1972 for unknown reasons. A.O.'s son H.O. began living with the applicant; they married on November 12, 1995, and had three children.
2. In 1995, H.O. murdered the applicant's mother in the seventh incident.
3. In each of the seven times H.O. caused physical and mental injury to the applicant and mother, the medical examiner confirmed the physical injuries and deemed a couple of events life-threatening.
4. Applicants submitted complaints to the Public Prosecutor and asked for protection, but there was no reaction. Complaints and petitions against H.O. were dismissed owing to insufficient evidence.
5. On February 5, 1998, H.O. attacked the applicant, mother, and sister with a knife; they were judged unfit for work for several days. H.O. killed the applicant's mother on the 7th occasion.

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6. The Public Prosecutor charged H.O. with premeditated murder at Diyarbakir Court on March 13, 2002. H.O. was sentenced to life in prison on March 26, 2002, but mitigating circumstances reduced his sentence to 15 years and 10 months.
7. H.O. was released due to good behavior, pre-trial imprisonment, and court review.
8. After being released, he threatened the applicant through her boyfriend, and she requested protection. In a letter dated June 20, 2008, the government told the court that H.O. had not completed his term and that the petitioner would be protected.
9. On November 14, 2008, the applicant's agent told the court that the applicant's life was in danger and that the authority didn't intervene despite multiple pleas; the applicant's mother died.
10. The court sent the government the same letter. The administration notified the court on November 21, 2008, that it had taken extensive safeguards.

## ISSUES RAISED

The main issues at hand are:

1. Does the State's role under Art. 2 of the ECOHR includes ensuring that an individual's right to life is not violated?
2. Was the applicant's treatment substantial enough to invoke Art. 3 of the Convention, and were the punishment given out by the State ineffective in deterring him?
3. Is the State's inability to save women from household violence, even if unintentional, a violation of the right to the same protection in Art. 14 of the Convention, and has this been established in international practice?

## RULES

### International law

(**Note:** Turkey has ratified the European Convention on Human Rights (ECOHR) & Convention on Elimination of Discrimination against Women (CEDAW))

**Art. 2 of the ECOHR:** It discusses the right to life. The applicant claimed that the authority failed to take adequate measures to protect her mom's life, whom her husband had murdered.

**Art. 3 of the ECOHR:** It discusses the right not to torture or be subject to inhumane treatment. The applicant further expressed that after receiving repeated acts of violence, threats of death, and physical harm, the authorities did nothing, leaving her in fear and suffering.

**Art. 14 of the ECOHR:** It discusses the right to non-discrimination.

**Art. 2 of the CEDAW, 1986:** It requires parties to criticise discrimination against women, accept to pursue, by all proper means, a policy of eradicating abuse against women, and do everything possible to end discrimination against women and change all discriminatory laws.

### National law

#### Criminal Code of Turkey -

- Art. 188
- Art. 199(1)
- Art. 449
- Art. 456(1),(2) and (4)
- Art. 457
- Art. 460

#### Family Protection Act, 1998 -

- Sec. 1
- Sec. 2

### ANALYSIS

### LEGAL ARGUMENTS

#### APPLICANT

**Art. 2 of ECHOR:** In order to protect her and her mom's lives after H.O.'s assaults and threats to kill them, the applicant claimed that authorities, including the Public Prosecutor, had not implemented protective measures outlined in the Family Protection Act for safeguarding of vulnerable individuals against domestic abuse even it went into effect in 1998. Authorities encouraged the petitioner and mother to drop their worries. The petitioner cited H.O.'s low murder sentence. The Court reportedly considered H.O.'s assertion that he

killed his mother out of honour when deciding the punishment, bringing the crime in line with social norms.

**In respect of Art. 3 of ECHOR:** With regard to Art. 3, The applicant argued that the bruises and pain she sustained from H.O.'s aggression constituted torture under Art. 3 of the Convention. She felt the abuse was state-sanctioned because, despite her numerous calls for aid, the authority was unable to shield her from her spouse.

**In respect of Art. 14 of ECHOR:** The petitioner further alleged she and her mother faced gender discrimination under Art. 14 and Art. 2 and 3. Citing domestic Civil Code provisions that made a distinction between men and women and established women's subjection in the home, the petitioner claimed de jure discrimination there. The applicant also alleged de jure inequality in the Code, which treated women as the property of males and negatively impacted women's right to liberty under the law of sexual offences. The petitioner argued this was why "honour" homicides received lower penalties, like H.O. 4's. Domestic violence committed by men was still tolerated and perpetrators were given impunity in spite of modifications to the Code in 2002 and 2004. The petitioner claimed she and her mother were violated Art. 2, 3, 6 and 13 for being women. Similar abuses against men were improbable.

## 2. CIVIL SOCIETY

**In respect of Art. 2 of ECHOR:** As an amicus curiae, Interight claimed that national authorities' failure to take reasonable steps to prevent breaches of the jus cogens form of rules by Art. 2 and 3 of Convention, like failing to put an end to atrocities caused by private persons or to prosecute, investigate or punish such violence, could be seen as an infringement of rights by the State, putting state in infringement of its legal duties and subjecting it to liability. According to Article 3 of the Convention on Elimination of Inequality Against Women, a state must ensure that its legal system is suitable and that its implementation and enforcement procedures are effective.

**In respect of Art. 14 of ECHOR:** Interights argued that the state's failure to save against household violence amounted to a failure to offer sex-based equal protection of the law. In the UN and Inter-American system, offence against females is increasingly recognised as unlawful discrimination.

### 3. THE STATE

**In respect of Art. 2 of ECHOR:** The state said it followed up on each allegation. The applicant and mother have withdrawn their allegations, which State claimed did without pressure. The state claimed H.O. was sometimes acquitted owing to lack of evidence. The State argued that separating the applicant and H.O. would violate Art. 8 of the Convention.

**In respect of Art. 3 of ECHOR:** The State stated the applicant's withdrawal of accusations and lack of cooperation precluded them from prosecuting H.O. According to the state, the applicant could have asked the Child Safety Agency and the Directorate of Service for housing in a woman's guest home.

**In respect of Art. 14 of ECHOR:** The State said there was no gender bias because the violence was mutual. In addition, it claimed that domestic law did not explicitly and formally discriminate against men and women in any way from criminal or family laws to judicial and administrative practices. It wasn't shown that domestic authorities didn't defend the applicant's right to life since she was a woman.

#### APPLICATION OF ESSENTIAL INGREDIENTS TO FACTS

To apply the rules, the following ingredients must be present:-

(a) Foreseeability of risk: The case revealed rising violence towards the applicant and her mother that necessitated safety measures and posed a threat to their health and safety. The husband had a history of domestic violence, thus future violence was likely. The mother reported that her life was at risk two weeks prior to her passing and requested assistance from the police to the prosecutor's office. Thus, a fatal attack was anticipated.

(b) Whether the government's actions were appropriate: In the claimant's case, even with the structure of aggressive behavior and use of lethal weapons, the officials dropped deliberations against the husband to avoid meddling in "family matters." Despite being informed of a death threat, it doesn't seem as though they evaluated the reasons behind the withdrawal of the complaint. As for the notion that statutory rule precluded the authorities from advancing, that legislative framework fell short of the State's affirmative obligations regarding domestic abuse protection. Nor could a violation of Art. 8 be alleged, as the danger to the applicant's mother required assistance.

According to the government, authorities had not analysed the husband's threat and found incarceration unreasonable. They'd ignored the difficulties. The rights of domestic abuse victims to life, mind, and body cannot supersede the rights of abusers.

The Court noted that officials might just have ordered protective measures pursuant to the Family Protection Law or issued an injunction barring the applicant's father from approaching, contacting, or entering the applicant's mother. They lacked due diligence and failed to defend the applicant's mother's right to life.

(c) Efficacy of the investigation: An appeal was still underway while the criminal case stemming from the death had been ongoing for more than six years. This could not be considered an immediate response by the police to an intentional homicide if the killer had previously admitted his guilt.

### CRITICAL ANALYSIS

When evaluating Art. 2 allegations, The court went differently with established case precedent. such as *Kontrova v Slovakia*.<sup>1</sup> This was because it made stopping domestic abuse a worthwhile undertaking, and failing to fulfil this duty led to a violation of the Convention. In assessing this, Court followed the test set in the *Osman* decision,<sup>2</sup> which was used in *Kontrova*.<sup>3</sup> This indicated that while Art. 2 may put a responsibility on the state to preserve life in the personal sector, it cannot lay a burden on governments. The court also noted findings from organisations like Amnesty International, which claimed that police departments continue to tolerate domestic violence and that some officers arbitrate disputes, support the abuser, or advise victims to drop their cases.,<sup>4</sup> pointing out that domestic violence is a significant issue in Turkey.

The Court then addressed Art. 3 and indicated the guidelines to follow in the case including Art. 3 "based on the circumstances of the case"<sup>5</sup> concluding that treatment she received met the requirements for an Art. 3 complaint. The history of violence and "the vulnerable status of women in SE Turkey" were identified."<sup>6</sup>

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<sup>1</sup> *Kontrová v Slovakia*, App. No. 7510/04 (ECHR, 31 May 2007)

<sup>2</sup> *Osman v UK*, ECHR 1998 — VIII 3124

<sup>3</sup> *Ibid.*

<sup>4</sup> 'Turkey: Women Confronting Family Violence' (Amnesty.org, 2004).

<sup>5</sup> *Costello-Roberts v UK*, App. No. 13134/87 (ECHR, 25 March 1993)

<sup>6</sup> *Opuz* (n 1) 145.

In relation to Art. 14, As per precedents,<sup>7</sup> discrimination has been defined as "treating differentially, without objective and fair rationale, the person in the pertinently same situation,"<sup>8</sup>. It analysed human rights norms in various jurisdictions to ascertain how they save women from household violence, citing the Belem do Para Convention, Convention on Eradication of Discrimination Against Women, and statements by the Inter-American Commission on HRs and UNCOHR.<sup>9</sup> Court acknowledged that the "State's failure to protect the female from household abuse undermines their right to equal protection from the law and that there does not need to be purposeful" based on these and European Convention."<sup>10</sup>

## CONCLUSION

According to the Court, Turkey has infringed on people's rights to equality, non-discrimination, and freedom from torture.

**Right to life:** According to Art. 2, authorities must have taken "particular measures consistent with the gravity of the case," the court reasoned. Court determined that the Turkish govt. breached Art. 2 for the applicant's mother's death since the authorities failed to act despite receiving information that must have prompted them to take action against H.O.

**Freedom from torture:** Regarding Art. 3, the Court determined that Turkey had infringed the provision by failing to sufficiently protect the applicant, because the treatment of H.O. had not been seriously interfered with by local authorities, including conducting medical exams and initiating criminal proceedings.

**Rights to non-discrimination and equality:** Regarding Art. 14, Due to the unique circumstance of the case and the overall insufficiency of local authority to protect females from household violence, Court determined that the Turkish govt. had breached that clause.

Given the aforementioned factors, this verdict can be seen as groundbreaking in terms of the state's obligation and international law on violence against women.<sup>11</sup> It acknowledged that in situations where there is substantial violence, States must act proactively and file criminal charges against those who commit such violence. The Court also emphasised the impact of

<sup>7</sup> D.H. v Czech , App. No. 57325/00 (ECHR, 13 November 2007)

<sup>8</sup> Opuz (n 1) 183.

<sup>9</sup> Opuz (n 1) 193-196.

<sup>10</sup> Opuz (n 1) 191.

<sup>11</sup> DANIEL, VIOLENCE AGAINST WOMEN: WITH OVERVIEW OF EUROPEAN HUMAN RIGHT' (Key Editore 2019), 81.

inequality on abuse against females and how that prevents the enjoyment of another right. This was accomplished using non-European resources, such as the CEDAW Committee Recommendation No 19<sup>12</sup> which focused on gender-based violence.<sup>13</sup> As a result, it is hoped that judgement "may make a difference for hundred of thousand of female victims of household violence in Europe."<sup>14</sup>



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<sup>12</sup> Nergihan, 'New NProtocol Aim To Protect Target Of Domestic Violence' (Todays Zaman, 2009).

<sup>13</sup> Filip, Klaus and Isabelle, *The European Convention On Human Right And Employment Relation*, BLOOMSBURY PUBLISHING, 373 (2014)..

<sup>14</sup> Maud, 'Speech At Europe Conference Of Ministers Of Justice' (Council of Europe, 2019).